Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GRUMMAN TECHNICAL SERVICES, INC., *et al.*,
Petitioners,

v.

ESTATE OF LAMAR ISHEE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order remanding a case to State court is reviewable by a federal court of appeals where that order was based on discretionary grounds but also includes an extraneous or ambiguous use of the "tag" of 28 U.S.C. § 1447(c).

2. Whether the government contractor defense should be applied to a closely supervised provider of services to the United States Navy, and whether a colorable claim of such a defense is enough to provide jurisdiction in federal court.

PARTIES TO THE PROCEEDING

In addition to Petitioner Grumman Technical Services, Inc. and Respondent Estate of Lamar Ishee, the following were parties to the proceedings in the Fifth Circuit:

McDonnell Douglas Corporation
UNC Aviation Services, Inc.
Jerome A. Kuechmann
Thomas Harden
Edwin E. Gennette
Jerry Fox
Benny Revels
Mark Glasgow
David Callaghan
Grover Miley
Angela N. Ishee, individually and on behalf of Caitlin S. Ishee, a minor child

RULE 29.6 LISTING

Petitioner Grumman Technical Services, Inc., is a subsidiary of Grumman Aerospace Corporation, which is a subsidiary of Grumman Corporation, which is a subsidiary of Northrop Grumman Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	3
REASONS FOR GRANTING THE PETITION	6
I. THE FIFTH CIRCUIT IS IN CONFLICT WITH THE FOURTH CIRCUIT ON THE REVIEWABILITY OF REMAND ORDERS	6
II. DENIAL OF GRUMMAN'S REMOVAL UNDER 28 U.S.C. § 1442(a) IMPROPERLY LIMITED APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE AND ERRONEOUSLY EXCLUDED A FEDERAL CONTRACTOR FROM FEDERAL COURT	11
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Amtreco, Inc. v. O.H. Materials, Inc., 802 F. Supp. 443 (M.D. Ga. 1992) 13, 14
Beaver Valley Power Co. v. National Eng'g and Contracting Co., 883 F.2d 1210 (3d Cir. 1989) 14
Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 11, 14, 15
Briscoe v. Bell, 432 U.S. 404 (1977) 7
Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir.), *cert. denied*, 114 S. Ct. 191 (1993) 15
Crawford v. National Lead Co., 784 F. Supp. 439 (S.D. Ohio 1989) 14
Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977) (*per curiam*) 7
Guillory v. Ree's Contract Serv., Inc., 872 F. Supp. 344 (S.D. Miss. 1994) 14
Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990) 15
In re Hawaii Federal Asbestos Cases, 960 F.2d 806 (9th Cir. 1992) 13
International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) 12
Lamb v. Martin Marietta Energy Systems, Inc., 835 F. Supp. 959 (W.D. Ky. 1993) 14
Mangold v. Analytic Servs., Inc., 77 F.3d 1442 (4th Cir. 1996) 6, 7, 8, 9, 10
Mesa v. California, 489 U.S. 121 (1989) 12, 16
Peterson v. Blue Cross/Blue Shield of Texas, 508 F.2d 55 (5th Cir.), *cert. denied*, 422 U.S. 1043 (1975) 13
Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 854 F. Supp. 400 (D.S.C. 1994) 14
Ryan v. Dow Chem. Co., 781 F. Supp. 934 (E.D. N.Y. 1992) 12, 13
Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988) 15

TABLE OF AUTHORITIES—Continued

	Page
Sykes v. Texas Air Corp., 834 F.2d 488 (5th Cir. 1987)	10
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)	6, 7
Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494 (1995)	10
United States v. Orleans, 425 U.S. 807 (1976)	15
Willingham v. Morgan, 395 U.S. 402 (1969)	11, 12, 16
Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940)	13
STATUTES	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	3, 7, 8
28 U.S.C. § 1367	2, 5, 7
28 U.S.C. § 1442	2, 4, 5, 7, 11, 12
28 U.S.C. § 1447	2, 5, 6, 7
1 U.S.C. § 1	13
Judicial Improvements Act of 1988, Pub. L. No. 100-702, § 1009(c), 1988 U.S.C.C.A.N. (102 Stat.) 4642, 4670	6

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PETITION FOR A WRIT OF CERTIORARI

Grumman Technical Services, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The per curiam opinions and orders of the United States Court of Appeals for the Fifth Circuit, App. 1a-3a, 12a-16a, are not officially reported. The opinions of the United States District Court for the Southern District of Mississippi, App. 4a-11a, 17a-53a, are not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 12, 1996. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include 28 U.S.C. § 1367, 28 U.S.C. § 1442, and 28 U.S.C. § 1447. The relevant portions of these statutes are set forth in the Appendix. App. 54a-55a.

STATEMENT OF THE CASE

A. Factual Background

Respondents are the surviving wife, child and estate of Captain Lamar Ishee ("the Ishees"). Their claim arises out of Captain Ishee's death during a military training flight accident near the runway at Meridian, Mississippi Naval Air Station ("NAS"). App. 19a. On August 26, 1992, while on active duty as a Marine Corps instructor pilot, Captain Ishee was aboard a TA-4J Skyhawk military jet aircraft being flown by Navy Lieutenant Vernon Hill. *Id.* The two men encountered a thunderstorm upon their return to the NAS, and after landing on the runway, the plane began sliding out of control. Lieutenant Hill and Captain Ishee ejected, but Captain Ishee's parachute never completely opened, and he fell to his death. *Id.*

Petitioner Grumman Technical Services, Inc. ("Grumman"), a government contractor, provided organizational level maintenance support for the Navy's TA-4J military aircraft at Meridian NAS. App. 19a-20a. In addition to Grumman, the original defendants also included the manufacturer of the TA-4J aircraft and the ejection seat, McDonnell Douglas Corporation ("MDC"), another maintenance contractor, UNC Aviation Services, Inc. ("UNC"), and several individual employees of Grumman and UNC. *Id.* All of the original corporate defendants were foreign corporations, and all of the individual defendants were Mississippi residents. *Id.* at 21a.

Contracts between Grumman and the United States prescribed the specific procedures the contractor was to follow in the performance and administration of TA-4J

maintenance activities. (R. G17-176).[1] Grumman was required to perform maintenance support services in accordance with the specific provisions of its contract, military specifications, aircraft and engine manuals, and numerous types of government instructions and directives. (R. M807-08). All of Grumman's employees working on the project rendered services in accordance with the directives and regulations of the commanding naval officer at the Meridian NAS. (R. M808). The government exercised control over each and every aspect of Grumman's performance of the government contracts. (R. M806-12). Indeed, Grumman was performing work that had traditionally been performed by enlisted personnel and officers of the United States Navy. The Navy replaced its own maintenance program at Meridian with contractor personnel in 1987. The Grumman and UNC people thus were simply "substitute sailors." (Deposition of Howard H. Pace at 80-81).

B. Proceedings Below

The Ishees filed their original Complaint in the Circuit Court for the First Judicial District of Hinds County, Mississippi, seeking compensatory and punitive damages under the Mississippi wrongful death statute. The defendants were Grumman, MDC, UNC, and several individuals. (R. G186). MDC and Grumman timely filed separate Notices of Removal on July 30, 1993 (they were later consolidated). (R. M1, 202; G1). Grumman based its removal on two jurisdictional grounds: (1) diversity of citizenship (28 U.S.C. § 1332), claiming that the individ-

[1] The record on appeal to the Fifth Circuit consisted of two district court files, one initiated by the filing of the MDC Notice of Removal, the other initiated by the filing of the Grumman Notice of Removal. Citations to the MDC file will appear as "R. M-," and citations to the Grumman file will appear as "R. G-." The district court record also contains the complete transcripts of all depositions taken in this case. The depositions have not been assigned record page numbers, so the citations to the depositions will refer to the actual page numbers of the depositions.

ual managerial defendants had been fraudulently joined and that the Ishee estate was properly resident in Alabama (rather than Mississippi); and (2) federal officer removal (28 U.S.C. § 1442(a)(1)), claiming a government contractor defense. (R. G1-9). The Ishees moved to remand the case to State court. (R. M110). Before the district court ruled on the Ishees' motion, the Ishees and MDC served a joint motion seeking the dismissal (without prejudice) of MDC, as well as the withdrawal of MDC's Notice of Removal. (R. M549). Grumman opposed the dismissal of MDC. App. 31a.

The district court entered its first Opinion and Order on December 15, 1994. App. 17a. On the issue of diversity, the district court did not determine the citizenship of the Ishee Estate or whether the managerial defendants were fraudulently joined. *Id.* The district court did permit the Ishees to file a Second Amended Complaint that added a number of newly identified "Doe" defendants. *Id.* at 26a-27a. The district court concluded that the post-removal identification of the Does "related back" to the date of the filing of the original removal petition and thereby precluded a fraudulent joinder removal. App. 26a-27a.

On the federal officer question, the district court found that Grumman, UNC and Fox (an individual defendant) were not entitled to remove under § 1442(a)(1), because they did not have a colorable claim to a federal defense and no causal nexus existed between the Ishees' allegations and the acts performed under federal authority. App. 40a-51a. MDC, by contrast, was assumed to have a valid claim to § 1442(a)(1) jurisdiction as a "person" acting under a federal officer, and the district court therefore "assumed" that it had subject-matter jurisdiction. *Id.* at 39a.

In addition to granting the plaintiffs leave to file their Second Amended Complaint, the district court granted the joint motion for voluntary dismissal of MDC. App. 39a. The court then found that it had dismissed all claims

over which it had original jurisdiction, and it declined to exercise its supplemental jurisdiction over the remainder of the case. *Id.* at 51a-53a; *see* 28 U.S.C. § 1367. The court then announced: "Pursuant to 28 U.S.C. §1447(c), the Court determines that this action has been 'removed improvidently and without jurisdiction' " and ordered the case remanded to State court. *Id.* at 52a-53a.

Grumman (and others) appealed, and the Fifth Circuit found that the district court had "assumed that at the time of removal it had jurisdiction to hear this case." App. 14a. This presumption of jurisdiction, the Fifth Circuit determined, created supplemental jurisdiction over the nonfederal elements of the case, which the district court declined, in its discretion, and ordered remand. *Id.* at 14a-15a. The Fifth Circuit noted, however, that the district court had stated at the end of its Opinion that it was remanding the case pursuant to 28 U.S.C. § 1447(c), leaving the circuit court unable to determine the basis of the district court's remand order. *Id.* at 15a-16a. Noting that "resolution of this question of jurisdiction at the time of removal is crucial to the determination whether we have appellate jurisdiction to review the remand order," the Fifth Circuit remanded the case to the district court for further proceedings on the "narrow question" of whether MDC had properly removed the case. *Id.*

The district court then issued its second remand order, this time focusing exclusively on the question of whether MDC's removal was proper. App. 4a. The court found that MDC qualified as a "person" under 28 U.S.C. § 1442, *id.* at 5a-6a, and that MDC had raised a colorable federal defense to the plaintiffs' claims. *Id.* at 6a-7a. The district court concluded, however, that MDC had failed to demonstrate that it had "acted under" an officer of the United States. *Id.* at 7a-10a. Without discussing any other grounds for removal, including fraudulent joinder and Grumman's federal officer defense, the district court then

determined that since no other party had properly removed the case, the court had no jurisdiction, and remanded pursuant to § 1447(c). *Id.* at 11a.

The Fifth Circuit found that the district court's holding based on § 1447(c) divested the court of its appellate jurisdiction, and the appeal was dismissed. App. 1a-3a. The case has now been remanded to Mississippi State court.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT IS IN CONFLICT WITH THE FOURTH CIRCUIT ON THE REVIEWABILITY OF REMAND ORDERS.

This case presents an important and unsettled question concerning appellate review of remand orders under this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (finding that only remands based on grounds specified in 28 U.S.C. § 1447(c)[2] are immune from appellate review under § 1447(d)). The result of the Fifth Circuit's rulings in this case is that even where 28 U.S.C. § 1447(c) did not provide the actual basis for the district court's remand order, an inadvertent or extraneous reference to that statute is enough to bar appellate review under 28 U.S.C. § 1447(d). This decision creates an untenable standard for appellate review of remand orders and conflicts with a recent decision of the Fourth Circuit, *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996). In *Mangold*, the court looked beyond the district court's "inadverten[t]" reference to § 1447(c) and accepted appellate review when it was

[2] The language of 1447(c) has changed since *Thermtron*. The current section involves remands based on either a defect in removal procedure or lack of subject-matter jurisdiction, while the prior statute, amended in 1988, involved remand for cases removed "improvidently and without jurisdiction." *See* Judicial Improvements Act of 1988, Pub. L. No. 100-702, § 1009(c), 1988 U.S.C.C.A.N. (102 Stat.) 4642, 4670.

unclear whether the district court's actual basis for remand was lack of subject-matter jurisdiction. *Id.* at 1452-53.

The key issue in these cases is ambiguity, rather than error. It is beyond dispute, as the Fourth Circuit correctly noted, that where a district court unambiguously bases its remand decision upon § 1447(c) an appellate court has no jurisdiction to review the order, even if it is "manifestly, inarguably erroneous." *Mangold*, 77 F.3d at 1450 (citing *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam)); *see also Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977). In both *Mangold* and the present case, however, the district courts explicitly based their decisions to remand on 28 U.S.C. § 1367(c), which, under *Thermtron*, made them reviewable. Only after emphasizing the discretionary nature of their orders did the two district courts refer to § 1447(c). Those allusions to § 1447(c) not only were clearly erroneous on the merits (which was, by itself, unreviewable), they did not constitute the actual basis of the district courts' decisions. The question of whether such ambiguity is reviewable is posed by the conflict between *Mangold* and this case.

The Fifth Circuit's view of this corollary to the *Thermtron* rule can produce absurd results, as the present case demonstrates. With the exception of one reference to § 1447(c) at the end of its 43-page opinion (App. 52a), the district court's initial remand order was based *entirely* on the premise that removal of the case was proper and that the court had jurisdiction (pursuant to MDC's right to remove under § 1442(a)). App. 39a. This was so clear to the district court that it did not deem it necessary to decide Grumman's allegation of federal jurisdiction based on diversity of citizenship. Indeed, the court itself noted that the question before it was whether, pursuant to 28 U.S.C. § 1367, it had discretion to remand the remainder of the case if MDC was dismissed. *Id.* at 34a-35a. In the final section of the Opinion, entitled "Discre-

tionary Jurisdiction," the court stated that it would "decline[] to exercise *continued* jurisdiction over the non-federal elements of this case." *Id.* at 52a (emphasis added). It was in this "Discretionary Jurisdiction" section where the district court also made its unaccountable reference to § 1447(c). *Id.* at 51a-52a.

Despite the district court's clear basis for its holding in § 1367, the Fifth Circuit remanded for clarification as to the grounds for the district court's order. App. 16a. Taking this hint from the Court of Appeals, the district court then found that MDC had not filed a proper notice of removal in the first instance. *Id.* at 10a. Without providing the parties an opportunity to brief the issues, the Fifth Circuit affirmed. *Id.* at 1a-3a.

The facts of the district court's initial remand order in the present case are strikingly similar to those of the remand in *Mangold,* but the conclusion drawn by the Fourth Circuit was precisely the opposite of that reached by the Fifth Circuit. *Mangold* involved an action filed in Virginia State court against a government contractor, Analytic Services, Inc. ("ANSER"), and an Air Force official ("Rooney"), for emotional distress and reputational injury that allegedly arose out of an investigation into charges of misconduct by Colonel Mangold. *Mangold,* 77 F.3d at 1444. Defendant Rooney removed the case to federal court, and the United States was substituted as a defendant for him under the Federal Tort Claims Act.

At the outset of a hearing on defendants' motions for summary judgment, plaintiffs revealed that they had voluntarily dismissed the United States as a defendant. *Id.* at 1451. Finding that there was no federal question remaining, the judge inquired: "Then there is no longer any basis for federal jurisdiction to this, is there?" *Id.* Counsel for ANSER suggested that it was "appropriate" for the court to "retain[] jurisdiction based upon the assertion by the private defendants of a Federal-immunity defense." *Id.* The district court, noting that it was "purely

discretionary with the Court whether to hold on to the case in the posture that it presently is in," asked counsel to proceed to the merits of the immunity claims. *Id.* (emphasis in original). The district court's subsequent written order denied defendants' immunity claim and found that "a determination of whether defendants have met [the state law evidentiary privilege] standard is better left to a Virginia tribunal." *Id.* at 1452. The district court then incongruously—and extraneously—ordered remand "pursuant to 28 U.S.C. § 1447(c)." *Id.*

The Fourth Circuit took up the jurisdictional issue *sua sponte* and found that, the district court's invocation of § 1447(c) notwithstanding, the court of appeals had jurisdiction to consider the remand order. The court determined that there is an important distinction between cases in which § 1447(c) is the actual ground invoked and those in which the district court bases its remand on other authority but nevertheless references § 1447(c):

> [P]owerful policy considerations and persuasive decisional authority support our power—and responsibility—to look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand. First, it must be the case, as some courts have had the occasion to recognize, that neither the citation of § 1447(c) nor the failure to cite it as presumed authority for a remand is conclusive of the real question: whether one of its two grounds is the actual basis being invoked as authority for remand. *If a review of the record discloses to a reviewing court's satisfaction that, notwithstanding any indications to the contrary, the actual basis upon which the court thought it was empowered to remand was neither of these, § 1447(d) does not bar review.*

Id. at 1450 (citations omitted) (emphasis added and in original).

This argument could be equally applied to the district court's initial remand order in this case. As the Fifth Circuit concluded, "[a]lthough the body of the opinion clearly indicates that the district court assumed that it had jurisdiction over the case and that it remanded the remaining state law claims pursuant to its discretionary authority, the district court states at the end of its opinion that it was remanding the case pursuant to 28 U.S.C. § 1447(c)." App. 15a. Unlike the *Mangold* court, however, the Fifth Circuit chose to handle this ambiguity (in language) by giving the district court another opportunity for error and almost openly suggesting to the district court that it base its second decision on § 1447(c). *Id.* at 15a-16a ("If the district court determines that McDonnell Douglas was unable to remove the case to federal court, the district court does not have jurisdiction over the case and the remand order is unreviewable by this court.").

While this Court established in *Gravitt* that an appellate court must tolerate even clearly erroneous decisions based on § 1447(c), nothing in *Gravitt* or its progeny suggests that the district court should be given a *second* opportunity for error when its first decision is (at best) ambiguous. Indeed, the *Gravitt* rule is already stretched to its logical limits. As Justice Ginsburg recently reiterated, it "'makes little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." *Things Remembered, Inc. v. Petrarca,* 116 S. Ct. 494, 500 (1995) (Ginsburg, J., concurring) (quoting *Sykes v. Texas Air Corp.,* 834 F.2d 488, 492 (5th Cir. 1987)). Although it is true, as Judge Gee lamented, that reviewability often turns on an "incantation" of § 1447(c) by the district court, *Sykes,* 834 F.2d at 492, ignoring the explicit and actual grounds of the remand order in the face of an ambiguous "incantation" simply pushes the *Gravitt* principle too far.

Important federal interests are at stake in this case, and Grumman has attempted to exercise its right to have such

claims heard in federal court. Indeed, Grumman presented to the district court not only a "colorable" claim to a federal defense (which is all that is required for removal under 28 U.S.C. § 1442(a), *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969)), but, as the discussion in Section II *infra* demonstrates, Grumman presented a clearly *meritorious* claim that it is covered by the government contractor defense. The district court improperly abrogated that right, and the Fifth Circuit declined to review that decision based on the slimmest connection to the *Thermtron* rule: a single, *ambiguous* invocation of § 1447(c). This case is an appropriate vehicle for this Court to consider the proper application of *Thermtron* and to resolve the conflict on this important issue between the Fifth and Fourth Circuits.

II. DENIAL OF GRUMMAN'S REMOVAL UNDER 28 U.S.C. § 1442(a) IMPROPERLY LIMITED APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE AND ERRONEOUSLY EXCLUDED A FEDERAL CONTRACTOR FROM FEDERAL COURT.

Two important and recurring issues are raised by the lower court's remand order, both involving the scope and application of the "government contractor defense," as delineated by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The district court denied Grumman, a military service contractor, the opportunity to have its federal issues—those arising out of its contract with the United States—adjudicated in federal court. This erroneous decision (which was left unreviewed by the Fifth Circuit) raises the underlying issues of whether, as the district court suggests, the government contractor defense is limited exclusively to procurement contracts and whether "independent contractors" are barred from invoking such a defense. Such a cramped reading of *Boyle* cannot be justified by the language or the logic of this Court's decision. The present case provides this Court

with the opportunity to make clear that *Boyle* applies to government service providers such as Grumman and that such providers are entitled to federal jurisdiction under 28 U.S.C. § 1442(a).

As this Court has noted, "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). The Federal Officer Removal Statute guarantees a federal forum both to officers (or agencies) of the United States, and to persons acting under such officers, for "any act under color of such office." 28 U.S.C. § 1442(a)(1). This Court has stated that § 1442(a)(1) should not be given a "narrow, grudging interpretation." *Willingham*, 395 U.S. at 407.

It is well-established that a defendant may remove under § 1442(a)(1) upon establishing: (1) that it is a "person"; (2) that it was acting under the direction of a federal officer; (3) that it has raised a colorable claim to a federal defense; and (4) that a causal nexus exists between the plaintiff's allegations and the acts performed under federal authority. *Mesa v. California*, 489 U.S. 121, 124-34 (1989). As a corporation that contracted to provide services to the United States, Grumman meets each of these tests.

1. As the district court noted, there is a split of authority regarding whether corporations may be considered "persons" under § 1442(a). *See* App. 40a-41a (citing cases). This Court held in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), that the word "persons" in § 1442(a) does not apply to federal agencies, but the Court left open the question of whether the statute applies to corporations. The district court, and the better reasoned opinions, have found that a corporation is a "person" for purposes of the removal statute, because the logic of *International Primate* does not apply to private corporations. *See* App. 42a; *Ryan v. Dow Chem. Co.*, 781

F. Supp. 934, 946 (E.D.N.Y. 1992) (including corporations within the definition of "person" makes the most sense "in light of the purpose of the section read as a whole"); *Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 57 (5th Cir.) (implicitly recognizing that corporations are "persons" under the statute), *cert. denied*, 422 U.S. 1043 (1975). Moreover, 1 U.S.C. § 1 provides that the word "person" includes corporations when used in a federal statute, "unless the context indicates otherwise."

2. The district court also properly held (or at least assumed), that Grumman acted "under the direction of an officer of the United States," and that, in "a general sense, the defendants' activities on the base were under the direction of the federal government." App. 42a. There is little doubt that an entity whose work was controlled by volumes of detailed, step-by-step specifications and overseen by a Navy officer "acted under" a federal official. *See Ryan*, 781 F. Supp. at 947.

3. The district court erred, however, in concluding that Grumman did not raise even a *colorable* claim to a government contractor defense under *Boyle*. This error presents this Court with an opportunity to clarify several important points about the application of the government contractor defense that have caused confusion in lower courts.

First, the district court and others have mistakenly attempted to distinguish the government contractor defense, established in *Boyle*, from the government agency defense, established in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The district court found that *Boyle* could not "by implication be extended to providers of services to the military," because the government contractor defense applies only to product manufacturers. App. 46a; *see also In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992) (holding that *Boyle* defense applies only to contractors supplying the military with equipment); *Amtreco, Inc. v. O.H. Mate-*

rials, Inc., 802 F. Supp. 443, 445 (M.D. Ga. 1992) (finding "no authority" to support the claim that the government contractor defense applies to service providers).

This is clearly wrong. Despite the district and *Amtreco* courts' professed inability to identify authority on this point (App. 46a; 802 F. Supp. at 445), many courts have found no distinction between the government contractor defense and the government agency defense. *See, e.g., Beaver Valley Power Co. v. National Eng'g and Contracting Co.*, 883 F.2d 1210, 1215 n.4 (3d Cir. 1989) (finding no doctrinal distinction between the "government contractor defense" and the "government agency defense"); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (applying the *Boyle* defense to performance contracts); *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994) (applying *Boyle* to service contracts); *Lamb v. Martin Marietta Energy Systems, Inc.*, 835 F. Supp. 959, 966 n.7 (W.D. Ky. 1993) (finding no reason to limit *Boyle* to procurement contracts since *Boyle* itself was based on *Yearsley*, which concerned a contractor's construction and other performance of work on dams for the government); *Crawford v. National Lead Co.*, 784 F. Supp. 439, 445 n.7 (S.D. Ohio 1989) ("Although the *Boyle* court discussed the government contractor defense within the context of a procurement contract, the defense is viable with regard to performance contracts."). These courts have correctly reasoned that the dispositive issue should be whether there was a "uniquely federal interest in the subject matter of the contract," not whether a procurement or performance contract is involved. *See Richland-Lexington Airport*, 854 F. Supp. at 422.

Moreover, this Court itself has found that the government contractor defense is not limited to product manufacturers. As the *Boyle* majority noted, "the federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction." 487 U.S. at 506. This Court

should use this case to reiterate that there is no distinction between the *Boyle* "government contractor" defense and the *Yearsley* "government agency" defense.

Second, the district court's holding that Grumman was not entitled to a federal defense because it was acting as an "independent contractor," App. 49a-51a, was erroneous. The district court relied on *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988), in concluding that the *Boyle/Yearsley* defense is inapplicable to independent contractors. *Id.* at 47a. This Court has sharply criticized the Eleventh Circuit's formulation of the government contractor defense, *Boyle*, 487 U.S. at 513, and other courts have found—contrary to *Shaw*—that *Boyle* eliminated the distinction between "agents of the United States" and "independent contractors." *See, e.g., Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir.), *cert. denied*, 114 S. Ct. 191 (1993).[3] This Court should use this case to explain that in examining the government contractor defense, the *Shaw* independent contractor analysis is unnecessary and unwarranted.

Third, even if the independent contractor analysis is proper, a contractor as closely supervised by the military as Grumman would clearly meet the criteria for agency. As the district court itself correctly noted, this Court's test for whether an individual or entity is an "independent contractor" is " 'whether its day-to-day operations are supervised by the Federal Government.' " App. 49a (quoting *United States v. Orleans*, 425 U.S. 807, 815 (1976)). The contracts between Grumman and the United States imposed precise specifications directing every facet of contractor conduct at Meridian NAS, from the clothes Grumman employees would wear (R. G37), to how often the waste baskets would be emptied (R.

[3] The Eleventh Circuit itself has recognized the abrogation of *Shaw*. *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1316 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

G77). The contracts described exactly what the contractors were required to do, specified the record-keeping and reporting required of them, and identified the Navy and Department of Defense forms they were required to prepare and submit. (R. G77-83). Every maintenance procedure—every turn of the wrench—was described in voluminous maintenance documents provided to Grumman by the Navy and incorporated into its contract. (R. G49 and R. G128-134). The district court does not explain why a contractor subject to such comprehensive government oversight does not meet the *Orleans* test.

The district court's several errors on this point were compounded by the misapplication of the low standard required for removal under 28 U.S.C. § 1442(a)(1). Under that statute, removal is not contingent upon establishing a federal defense on the merits. Rather, those seeking to invoke § 1442(a)(1) removal must raise only a "colorable" claim to a federal defense. *Willingham*, 395 U.S. at 406-07; *see also Mesa*, 489 U.S. at 132-33. There is simply no doubt that Grumman established at least a "colorable" claim to a government contractor defense.

4. The final prong of the *Mesa* test was satisfied in this case because a causal nexus exists between the claims asserted by the Ishees and the acts performed by Grumman under color of federal office. *Mesa*, 489 U.S. at 131-32. As this Court has instructed, a defendant's mere presence at the place of his federal employment is sufficient to satisfy the causal nexus requirement when the claims asserted against the officer arise out of that employment. *See Willingham*, 395 U.S. at 409 (finding the required "causal connection" where petitioners had shown that their only contact with respondent occurred while they were performing their duties).

It is undisputed that the claims asserted against Grumman all relate to the contractual duties owed to the United States government. The causal nexus prong of the *Mesa*

test thus was satisfied, and the district court's conclusion that no causal nexus existed, App. 51a, was clearly erroneous.

The district court's determination that providers of services to the military such as Grumman are not covered by the government contractor defense constitutes a serious misinterpretation of this Court's holdings in *Boyle* and *Yearsley*. Furthermore, the district court's decision barred the door of federal court to a military contractor with important federal rights at stake. This Court should reverse this erroneous decision and establish clearly that the government contractor defense is to be applied, in federal court, to military service contractors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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